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JS-6

United States District Court  
Central District of California

BARRY ROSEN,  
Plaintiff,

v.

MICHAEL “MIKE” MEDLIN DBA  
AFFORDABLE AUTOGRAPHS,  
AFFORDABLEAUTOGRAPHSHOLLY  
WOOD; HOLLYWOOD SHOW, LLC, A  
CALIFORNIA LIMITED LIABILITY  
COMPANY; AND DOES 1-10,  
Defendants.

Case No. 2:15-CV-05789-ODW-JC

**ORDER GRANTING PLAINTIFF’S  
MOTION FOR DEFAULT  
JUDGMENT [66]**

**I. INTRODUCTION**

This matter comes before the Court on Plaintiff Barry Rosen’s Motion for Default Judgment against Defendant Michael Medlin. (ECF No. 66.) After carefully considering Rosen’s moving papers, in addition to the Court’s own familiarity with the allegations in this action, the Motion is **GRANTED**.

**II. FACTUAL BACKGROUND**

Barry Rosen is a professional photographer and the copyright holder of the work at issue —two photographs of model Ali Landry. (Rosen Decl. ¶¶ 2– 3, ECF

1 No. 66-1.) On July 18, 2015, Rosen discovered one of the copyrighted photographs  
 2 for sale on eBay by the user “affordableautographshollywood.” (Rosen Decl. ¶ 12.)  
 3 Rosen sent eBay a Digital Millennium Copyright Act (DMCA) notice to remove the  
 4 listing; eBay complied with the demand and informed the seller, Medlin, of the  
 5 takedown notice. (Rosen Decl. ¶ 8.) On July 20, 2015 Rosen filed his original  
 6 Complaint against Medlin for copyright infringement. (ECF No. 1.) Medlin was  
 7 properly served and answered on September 2, 2015. (ECF Nos. 13, 23.)

8 On September 10, 2015, Rosen filed a First Amended Complaint, alleging that  
 9 Medlin printed the images of Landry off the Internet, obtained the celebrity’s  
 10 signature, and sold the photographs both on eBay and in person. (First Am. Comp.  
 11 (“FAC”) ¶¶ 2–5, ECF No. 25.) After filing the FAC, Rosen claims he attended a  
 12 celebrity memorabilia event at the Hollywood Show, where he found and purchased  
 13 two prints of his Landry photos from Medlin. (Rosen Decl. ¶ 12.) Though served  
 14 with the FAC, Medlin failed to answer the allegations, and on October 8, 2015, the  
 15 Clerk entered default against him. (*See* ECF Nos. 31, 33.) However, on October, 14,  
 16 2015, Medlin moved to set aside the default, claiming he did not receive the FAC.  
 17 (ECF No. 36.) In support of his motion, Medlin claimed that he found and printed the  
 18 Landry photos from Google and that this formed a basis for a meritorious defense.  
 19 (*Id.* at 6:6–10, 9:20–21.) The Court granted Medlin’s motion, giving him 14 days to  
 20 respond to the FAC. (ECF No. 54.)

21 Medlin once again failed to file a responsive pleading, and on January 8, 2016,  
 22 the Clerk again entered his default. (ECF No. 56.) On January 25, 2016, Medlin  
 23 again moved to set aside the default, claiming that he misunderstood the Court’s  
 24 order. (ECF No. 61.) The Court denied Medlin’s motion. (ECF No. 69.) Rosen  
 25 moved for Default Judgment and this Motion is now before the Court. (ECF No. 66.)

### 26 **III. LEGAL STANDARD**

27 Default judgment is governed by Federal Rule of Civil Procedure 55 and allows  
 28 the court to enter default judgment “[w]hen a party against whom a judgment for

1 affirmative relief is sought has failed to plead or otherwise defend.” Fed. R. Civ. P.  
 2 55(a). It is within the Court’s discretion to enter default judgment following entry of  
 3 default by the clerk. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986); *see* Fed.  
 4 R. Civ. P. 55(b)(2). Moreover, in light of Medlin’s failure to answer the First  
 5 Amended Complaint, all of the allegations therein, aside from the amount of damages,  
 6 are deemed admitted. Fed. R. Civ. P. 8(b)(6); *Geddes v. United Fin. Grp.*, 559 F.2d  
 7 557, 560 (9th Cir. 1977).

#### 8 IV. DISCUSSION

9 In determining whether an entry of default judgment is appropriate, the Ninth  
 10 Circuit has identified seven factors for district courts to consider: (1) the possibility of  
 11 prejudice to the plaintiff, (2) the merits of plaintiff’s substantive claim, (3) the  
 12 sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the  
 13 possibility of a dispute concerning material facts; (6) whether the default was due to  
 14 excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil  
 15 Procedure favoring decisions on the merits. *Eitel*, 782 F.2d at 1471–72. All of the  
 16 *Eitel* factors weigh in favor of granting default judgment on Rosen’s copyright  
 17 infringement claim. The Court addresses each factor in turn.

##### 18 A. *Eitel* Factors

19 The first *Eitel* factor considers whether a plaintiff would suffer prejudice if  
 20 default judgment were not entered. *PepsiCo, Inc. v. Cal. Security Cans*, 238 F. Supp.  
 21 2d 1172, 1177. Here, Rosen would suffer prejudice because he would be left without  
 22 a remedy given Medlin’s refusal to actively participate in this litigation or in  
 23 settlement discussions. *See id.*

24 The second and third *Eitel* factors—the merits of plaintiff’s substantive claim  
 25 and the sufficiency of the complaint—are often discussed in tandem. *See id.* at 1175.  
 26 Here, the FAC alleges willful copyright infringement. Specifically, Rosen contends  
 27 that he is the copyright holder of the Landry photographs and that Medlin willfully  
 28 violated Rosen’s exclusive rights under the Copyright Act by (1) reproducing the

1 copyrighted work and (2) distributing copies of the copyrighted work to the public by  
 2 offering them for sale. (FAC ¶¶ 2–5.) To succeed on a copyright infringement claim,  
 3 a plaintiff must establish (1) ownership of a valid copyright and (2) that the defendant  
 4 violated at least one of the exclusive rights of the copyright holder. 17 U.S.C. § 106.  
 5 Moreover, a plaintiff sustains his burden of proving willfulness “by showing [the]  
 6 defendant knew or should have known it infringed [the plaintiff’s] copyright.” *UMG*  
 7 *Recordings, Inc. v. Disco Azteca Distrib., Inc.*, 446 F. Supp. 2d 1164, 1173 (E.D. Cal.  
 8 2006) (quoting *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1543  
 9 (S.D.N.Y. 1991)).

10 Rosen sufficiently pleads factual allegations to sufficiently state the elements of  
 11 his claim. As alleged in the FAC, and evidenced by Certificates of Registration from  
 12 the U.S. Copyright office, Rosen owns the copyright to the Ali Landry photographs at  
 13 issue. (FAC ¶ 15; Rosen Decl., Ex. 1.) Rosen alleges that he did not grant Medlin  
 14 permission to copy or distribute the photographs and that Medlin went on to sell prints  
 15 of the copyrighted work on eBay (under the moniker “affordableautographs  
 16 hollywood”) and at trade shows such as Comic-Con and the Hollywood Show. (FAC  
 17 ¶¶ 16, 26.) Rosen notes that Medlin continued to sell the copyrighted photos even  
 18 after he received a DMCA notice from eBay and months after he was served with the  
 19 original complaint. (Rosen Dec. ¶ 12.) And as previously determined by the Court,  
 20 Medlin failed to put forward a meritorious defense based on fair use. (*See* Order  
 21 Denying Mot. to Set Aside Entry of Default 5:19–20, ECF No. 69.) Accordingly, the  
 22 Court finds that the second and third *Eitel* factors favor granting default judgment.

23 Next, the Court must consider the amount of money at stake in relation to the  
 24 seriousness of Medlin’s conduct. *Eitel*, 782 F.2d at 1471–72. Here, Rosen seeks an  
 25 amount that consists of discretionary awards and statutory damages provided under  
 26 the Copyright Act. *See* 17 U.S.C. §§ 504, 505; *Elekta Ent. Group, Inc. v. Crawford*,  
 27 226 F.D.R. 388, 393 (C.D. Cal. 2005). Historically, courts have awarded significant  
 28 damages against a defendant accused of engaging in willful infringement and who

1 failes or refuses to respond to the compalint against him. *See Phillip Morris U.S.A.*  
2 *Inc. v. Castworld Prods.*, 219 F.R.D. 494, 500 (C.D. Cal. 2003) (awarding damages in  
3 the amount of \$2,000,000 for willful trademark infringement when defendant failed to  
4 participate in the judicial process); *see also Craigslist, Inc. v. Naturemarket, Inc.*, 694  
5 F. Supp. 2d 1039, 1060 (N.D. Cal. 2010) (granting large damages and entry of default  
6 when defendant engaged in willful copyright infringement and failed to participate in  
7 litigation). Given Medlin’s willful infringement, combined with his failure to actively  
8 participate in this litigation, this factor favors entry of default judgement.

9 The Court also concludes that the next factor, the possibility of a dispute  
10 concerning material facts, favors entry of default judgment. Because Medlin failed to  
11 answer the FAC, the facts therein are taken as true. Fed. R. Civ. P. 8(b)(6); *Geddes v.*  
12 *United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977). Thus, no issues of material fact  
13 will preclude entry of default judgment.

14 The sixth *Eitel* factor considers whether the default was due to excusable  
15 neglect. *Eitel*, 782 F.2d at 1472. Medlin was properly served twice in this case, and  
16 his two Motions to Set Aside Default indicate that he is clearly aware of the pending  
17 litigation. (*See* ECF Nos. 35, 61.) His repeated failure to timely respond coupled with  
18 his inadequate justifications makes *excusable* neglect unlikely. (*See* Order Denying  
19 Mot. to Set Aside Entry of Default 3:15–16.) Accordingly, this factor favors entry of  
20 default judgment.

21 The final *Eitel* factor examines whether the strong preference that cases be  
22 decided on the merits weighs against the entry of default judgment. *Eitel*, 782 F.2d at  
23 1472. However, when a defendant’s failure to appear “makes a decision on the merits  
24 impractical,” entry of default is warranted. *Pepisco*, 238 F. Supp. 2d at 1177. Here,  
25 the Court offered Medlin an additional opportunity to defend this suit on the merits by  
26 setting aside the original entry of default. (*See* ECF No. 54.) Medlin chose to  
27 squander his second chance. Medlin’s consistent inability to follow court rules has  
28 not only caused significant delay, but has also prohibited Rosen from efficiently

1 litigating his claim. As a decision on the merits has become increasingly impractical  
2 due to Medlin's conduct, the final factor favors an entry of default judgment.

3 In sum, after reviewing Rosen's Motion in light of the factors articulated in  
4 *Eitel*, the Court deems entry of default judgment appropriate. The Court now turns to  
5 Rosen's requested relief.

## 6 **B. Remedies**

7 Rosen requests a permanent injunction, statutory damages in the amount of  
8 \$100,000 for willful copyright infringement, and attorney's fees. (Mot. 15–19.) The  
9 Court addresses each in turn.

### 10 **1. Permanent Injunction**

11 The Copyright Act authorizes a court to grant temporary or final injunctions to  
12 “prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a). Generally, a  
13 permanent injunction will be granted when liability has been established and a threat  
14 of continuing violations exists. *MAI Sys. Corp. v. Peak Computer*, 991 F.2d 511, 520  
15 (9th Cir. 1993).

16 Here, liability has been established with the entry of default. Medlin's conduct  
17 since litigation commenced, specifically his continued sale of Rosen's copyrighted  
18 photos, signals a threat of future violations. Thus, an injunction here is appropriate.

### 19 **2. Statutory Damages**

20 Rosen requests \$100,000 in statutory damages for willful copyright  
21 infringement, noting that in willful infringement cases, courts often award multipliers  
22 of three (or more) times the unpaid licensing fees as statutory damages. (Mot. 16:20–  
23 22) (citing *Odnil Music, Ltd. v. Katharsis LLC*, S-05-0545 WBS JFM, 2006 WL  
24 2545869, \*8 (E.D. Cal. July 21, 2006); *Fermanta Int'l Melodies, Inc. v. Champions*  
25 *Golf Club, Inc.*, 712 F. Supp. 1257, 1264 (S.D. Tex. 1989). Rosen argues that he  
26 routinely receives between \$5,000 and \$10,000 for a single use, editorial license for  
27 his photographs and adds that Medlin would have paid \$20,000 for proper licenses to  
28 use both Landry photographs. (Mot. 17:9–11; Rosen Decl. ¶ 21.) He asks the Court

1 to apply a multiplier of five for willful misconduct (5 x \$20,000) damages. (Mot.  
2 17:13.) Rosen argues that this amount falls within the applicable range for willful  
3 infringement and should deter future misconduct by Medlin. (Mot. 17:13–16.)

4 The Copyright Act allows a copyright owner to elect to recover an award of  
5 statutory damages in lieu of actual damages any time before final judgment is  
6 rendered. 17 U.S.C. § 504(c)(1). The Act allows for statutory damages in a sum not  
7 less than \$750 or more than \$30,000 for all infringements with respect to any one  
8 work. *Id.* Furthermore, “[i]n a case where the copyright owner sustains the burden of  
9 proving, and the court finds, that infringement was committed willfully, the court in  
10 its discretion may increase the award of statutory damages to a sum of not more than  
11 \$150,000.” *Id.* § 504(c)(2).

12 Although Rosen suggests a multiple of five would be appropriate, the Court is  
13 guided by “what is just in the particular case, considering the nature of the copyright,  
14 the circumstances of the infringement and the like.” *Peer Int’l Corp. v. Pausa*  
15 *Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990). The circumstances of this case  
16 simply do not warrant an award of \$100,000. Medlin found the two Landry images on  
17 Google, obtained the celebrity’s signature, and sold the prints for roughly \$30 dollars.  
18 (Mot. to Set Aside Entry of Default 6:6–10, ECF No. 36; Rosen Decl., Ex. 2.) Medlin  
19 was put on notice of his infringing conduct through the DMCA takedown notice,  
20 however he subsequently sold two of the copyrighted images at trade shows. While  
21 not taking lightly the seriousness of Medlin’s conduct, the circumstances of this case  
22 mimic similar copyright lawsuits brought by Rosen in this District. *See, e.g., Rosen v.*  
23 *Global Net Access*, No. CV 10–2721–DMG (E), 2014 WL 2803752 (C.D. Cal. Jan.  
24 16, 2015) (awarding \$45,000 for nine photographs); *Rosen v. Netfronts, Inc.*, No. CV  
25 12–658 CAS (FFMx), 2013 WL 3467205 (C.D. Cal. July 9, 2013) (awarding \$800 for  
26 four photographs). Factoring in the willfulness of Medlin’s conduct, the Court  
27 concludes that an award of \$7,500 per photograph sufficiently compensates Rosen,  
28



1 while also demonstrating to Medlin that it “costs less to obey” the Copyright Act than  
2 to violate it. *Odnil Music Ltd.*, 2006 WL 2545869, at \*7.

### 3           **3. Attorney’s Fees**

4           Rosen also requests an award of attorney’s fees. Under the Copyright Act, a  
5 court may award costs and a reasonable attorney’s fee to the prevailing party. 17  
6 U.S.C. § 505. The Ninth Circuit has identified five non-exclusive factors that a court  
7 may consider in deciding whether to award attorney’s fees under section 505: (1) the  
8 degree of success obtained; (2) frivolousness; (3) motivation; (4) objective  
9 unreasonableness; and (5) the need to advance considerations of compensation and  
10 deterrence. *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1432 (9th Cir. 1996); *Smith*  
11 *v. Jackson*, 84 F.3d 1213, 1221 (9th Cir. 1996).

12           The factors favor awarding attorney’s fees in this case. The foregoing analysis  
13 indicates that Rosen was successful on the merits and that his claim was not frivolous.  
14 Rosen adds that attorney’s fees would be appropriate not only because of Medlin’s  
15 willful conduct, but also because many of the motions filed in this lawsuit could have  
16 been avoided if Medlin actively participated in this litigation or engaged in settlement  
17 discussions. (Mot. 18:19–21.) Indeed, Medlin’s consistent inability to follow court  
18 rules, with no credible explanation for his conduct, resulted in a waste of judicial  
19 resources. *See Sun World, Inc. v. Lizarazu Olivarría*, 144 F.R.D. 384, 390 (E.D. Cal.  
20 1992). The Court also agrees that an award of attorney’s fees against Medlin serves as  
21 a further reminder against engaging in willful misconduct. *See Magnuson*, 85 F.3d at  
22 1432 (noting that in considering attorney’s fees under section 505, a district court  
23 should “seek to promote the Copyright Act’s objectives”) (quoting *Historical*  
24 *Research v. Cabral*, 80 F.3d 377, 378–79 (9th Cir. 1996)). Accordingly, the Court  
25 awards Rosen \$13,130.00 in attorney’s fees and \$485.00 in costs.



**V. CONCLUSION**

For the reasons discussed above, the Court hereby **GRANTS** Rosen's Motion for Default Judgment (ECF No. 66). The Court awards a permanent injunction, \$15,000 in statutory damages, \$13,130.00 in attorney's fees and \$485.00 in costs.

**IT IS SO ORDERED.**

April 27, 2016

A handwritten signature in cursive script, appearing to read "Otis D. Wright, II", is written over a horizontal line.

**OTIS D. WRIGHT, II**  
**UNITED STATES DISTRICT JUDGE**